

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

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Mailed: February 10, 2005

Opposition No. 91153357

Opposition No. 91154745

ARTISAN CINEMATIC ENTERPRISES, INC.

V.

ARTISAN ENTERTAINMENT INC.

Before Seeherman, Quinn and Bucher,
Administrative Trademark Judges.

By the Board:

Artisan Cinematic Enterprises, Inc. (hereinafter
"opposer") has opposed registration of application Serial
Nos. 75741143 and 75741963, both filed on July 1, 1999, for
the mark ARTISAN ENTERTAINMENT and design as shown below:



for "computerized online ordering services in the field of
video and audio recordings," based on Artisan Entertainment
Inc.'s (hereinafter "applicant") bona fide intent to use the
mark in commerce, and for "providing information on current
and future movie offerings via a global computer network"
with claimed dates of first use and first use in commerce of
October 1, 1998.

In the notices of opposition, now consolidated, opposer alleges that it owns application Serial No. 75765407 for ARTISAN for "motion picture development and production" filed on August 26, 1999, with claimed dates of first use and first use in commerce of September 1, 1985; that its application has been suspended by the Examining Attorney pending the outcome of the involved applications; that opposer has prior use; and that the parties continued use of their respective marks is likely to cause confusion.

In its answers, applicant denied the salient allegations of the notices of opposition and put forth the following affirmative defenses: opposer never developed a motion picture; opposer has fraudulently stated in its application that it has developed and produced motion pictures since 1985;¹ opposer has never released a motion picture film for theatrical release; opposer has no online services related to its movie offerings whatsoever and, therefore, there is no likelihood of confusion with applicant's mark; and applicant's mark has been in use for at least four years without any evidence of confusion.

This case now comes up on applicant's motion for summary judgment. Opposer has filed a response thereto.²

¹ This allegation appears to go to the validity of opposer's own application and not to whether opposer has rights in the mark.

² Subsequent to opposer's response to the motion, the Board suspended proceedings for settlement negotiations between the

In its motion, applicant states that it served its initial round of discovery requests on January 31, 2003, including requests for admissions; that on April 10, 2003, applicant wrote to opposer noting that no responses had been served; and that after several assurances from opposer, responses were finally received on July 17, 2003. Applicant argues that inasmuch as opposer did not respond to applicant's requests for admissions within 35 days after service of the requests, the following requests are deemed admitted under Fed. R. Civ. P. 36(a):

1. Opposer has never produced and distributed a Motion Picture for theatrical release under Opposer's mark.
2. Opposer has never produced and distributed videos embodying motion pictures for general distribution to the public under Opposer's mark.
3. The services in Opposer's Application Serial No. 75/765,407 were not rendered in interstate commerce as of September 1, 1985, Opposer's claimed date of first use.

Applicant concludes that because opposer failed to serve timely answers to applicant's requests for admission, it has admitted that opposer has never produced or distributed motion pictures or videos and that it was not rendering services under its mark as of September 1, 1985, its claimed date of first use. Therefore, applicant argues,

parties. Then, having heard nothing further, the Board issued a status inquiry on September 9, 2004, indicating that if there were no response, or the parties indicated that negotiations were concluded without an agreement, the Board would decide applicant's motion for summary judgment. Nothing was filed by either party.

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opposer has no standing to bring this opposition because it has admitted that it does not actually use the mark in commerce and, without use, there can be no likelihood of confusion among consumers.

With its motion for summary judgment, applicant has submitted copies of applicant's first set of interrogatories, requests for production of documents and things and requests for admission, served by first class mail on January 31, 2003; a letter dated April 10, 2003 from applicant notifying opposer that responses to discovery were now a month late; an email dated April 22, 2003 from opposer indicating that responses would be sent within the week; a letter dated May 12, 2003 from applicant indicating that opposer's prior promise to provide responses was now two weeks overdue; and an email exchange between counsel resulting in opposer's promise on June 9, 2003 that the responses would be sent out that day.

In response to applicant's motion for summary judgment, opposer essentially contends that applicant has in its possession documents that opposer has produced over the course of several years of discussion between the parties; that these documents clearly demonstrate opposer's use of its mark in commerce as originally claimed; and that opposer has provided responses to applicant's discovery requests. Opposer has included the declaration of James R. Eley,

president of and counsel for opposer, in which he declares, among other things, that beginning in 1985, opposer began a project to develop feature motion pictures, in particular one entitled DRIVEAWAY; that while the screenplay for DRIVEAWAY was under development, Mr. Eley promoted the project full-time under the Artisan name and sought participation of all major motion picture studios and distributors via telephone, mailings and the attendance of seminars, all outside the state of Ohio; that the screenplay treatment that Mr. Eley mailed out generated a significant amount of interest in the trade, and that numerous potential production partners requested copies of the screenplay to read upon completion; that during the development of the screenplay Mr. Eley negotiated with various companies for product placement in the film, contacted the film bureaus in nearly every state seeking information and assistance in scouting film locales and lined up talent for the film; that at the time applicant adopted its mark opposer was listed with the Ohio Secretary of State as a corporation in good standing; that since 1985 opposer has never abandoned its rights in the ARTISAN mark; and that opposer still intends to produce the DRIVEAWAY project and release it under the ARTISAN label.

The burden is on the party moving for summary judgment to show the absence of any genuine issue of material fact,

and that it is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). The evidence must be viewed in a light favorable to the non-movant, and all justifiable inferences are to be drawn in non-movant's favor. In considering the propriety of summary judgment, the Board may not resolve issues of material fact; it may only ascertain whether such issues are present. See *Lloyds's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); *Opryland USA, Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1993); and *Olde Tyme Food Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

As a preliminary matter, we agree with applicant that opposer failed to timely respond to applicant's requests for admission. If a party on which requests for admission have been served fails to timely respond thereto, the requests will stand admitted unless the party is able to show that its failure to timely respond was a result of excusable neglect or unless a motion to withdraw or amend the admissions is filed pursuant to Fed. R. Civ. P. 36(b) and granted by the Board. Inasmuch as opposer has done none of the above, applicant's requests for admission are deemed admitted. See TBMP § 407.03(a).

Notwithstanding our determination above, upon careful consideration of the record (including the admissions), and resolving all reasonable inferences in opposer's favor, we find that applicant has not demonstrated that it is entitled to summary judgment. Opposer's declaration raises a genuine issue of material fact as to standing and priority in terms of whether opposer has made use analogous to trademark use prior to any date on which applicant can rely. See *T.A.B. Systems v. PacTel Teletrac*, 77 F.3d 1372, 37 USPQ2d 1879 (Fed. Cir. 1996) (Analogous use must be of such a nature and extent as to create prior public identification of the target term with the party's product or service).

Accordingly, applicant's motion for summary judgment is denied and proceedings herein are resumed. To the extent that any discovery requests are still outstanding, the parties have until **fifteen days** from the date of this order to respond. Trial dates, including the close of discovery, are reset as follows:

THE PERIOD FOR DISCOVERY TO CLOSE:	May 1, 2005
30-day testimony period for party in position of plaintiff to close:	July 30, 2005
30-day testimony period for party in position of defendant to close:	September 28, 2005
15-day rebuttal testimony period to close:	November 12, 2005

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In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.